

No. 88-1865

In The

Supreme Court of the United States

October Term, 1988

STATE OF ARIZONA,

Petitioner,

vs.

GARY M. BAUER, and
YOCO ENTERPRISES, INC.,
d.b.a. Castle Adult Bookstore,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC. IN SUPPORT OF PETITIONER STATE OF ARIZONA

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INTEREST OF AMICUS CURIAE

American Family Association, Inc. (AFA), has received consent of the parties to the filing of this Brief Amicus Curiae. Consent of Petitioner, State of Arizona, was received from its attorney, Bruce A. Taylor, Esq, Assistant Attorney General, and of Respondents, Gary Bauer and Yoco Enterprises, Inc., from their attorney, Robert Eugene Smith, Esq.

AMERICAN FAMILY ASSOCIATION'S INTEREST

The American Family Association, Inc. is a nonprofit organization incorporated in 1977 under its original name of National Federation for Decency, Inc. AFA continues to operate as a leader of citizen and church participation to promote traditional

American family values and apply the Biblical ethic in society. As Amicus, AFA has members in all 50 states; has over 500 chapters of local citizens who are active in seeking to preserve community integrity through elimination of the harmful effects of sexually oriented businesses; and has over 380,000 individuals and churches who are subscribers to its monthly newsletter, AFA Journal.

AFA is constantly asked by local governments and law enforcement officers for advice and guidance on methods of enforcing obscenity laws. AFA chapters actively seek to preserve the integrity of their local communities. The effective enforcement of obscenity laws and the imposition of available punishment are methods which are used by local chapters.

The ability of AFA to continue to call for the enforcement of such laws is contingent upon a finding that a state may impose sanctions upon convicted obscenity violators as it would other convicted criminals. Amicus, and the citizens it represents, would be severely harmed if the decision of the Arizona Court of Appeals is permitted to stand. Consequently, AFA will support the position of the State of Arizona regarding the constitutionality of the imposition of the license forfeiture punishment.

LAW AND ARGUMENT

THE ARIZONA COURT OF APPEALS ERRED IN DECLARING THE APPLICATION OF THE GENERAL ARIZONA LICENSE FORFEITURE PROVISION AN UNCONSTITUTIONAL PRIOR RESTRAINT AS APPLIED IN AN OBSCENITY CONVICTION

The Arizona Court of Appeals misconstrued the application of a general criminal penalty statute in declaring that it constituted a prior restraint. State v Bauer, 768 P.2d 175 (Ariz. App. 1988). Under the Arizona obscenity statute, defendant Bauer, when found guilty of a class 6 felony faced one and one-half years imprisonment. Ariz. Rev. Stat. Ann. §13-701.

The trial court was authorized to order the business license forfeiture pursuant to Ariz. Rev. Stat. Ann. §13-603. This section provides, in part:

> G. If a person or an enterprise is convicted of any

> felony, the court may, in addition to any other sentence authorized by law, order the forfeiture, suspension or revocation of any charter, license, permit or prior approval granted to such person or an enterprise by any department or agency of the state or of any political subdivision.

The imposition of the punishment under §13-603 does not constitute a prior restraint in that it does not prohibit an individual from engaging in speech activities. The provision merely requires the forfeiture of various business licenses. There is no prohibition which would prevent the individual from applying for another license to carry on the business.

The defendant was subject to imprisonment of one and one-half years upon conviction of the obscenity offense. Such punishment would have clearly "chilled" his First Amendment rights, but such punishment is well

within recognized constitutional limits. See, Near v Minnesota, 283 U.S. 697, 708 (1931); Polykoff v Collins, 816 F.2d 1326, 1337 (9th Cir. 1987). The conditional probation afforded the defendant greater expressive avenues than if the general statutory imprisonment provisions had been imposed.

In its decision the Court of Appeals stated:

> It is important to distinguish prior restraint from subsequent punishment. Subsequent punishment for violations of criminal obscenity laws does not prevent one from expressing oneself; it simply provides punishment for an expression which is harmful to the public welfare. This indeed "chills" free expression to some extent, but that is outweighed by the state's interest in the welfare of its citizens. On the other hand, a prior restraint stops one from speaking at all. This goes beyond "chilling"; it "freezes" speech.

State v Bauer, 768 P.2d 175, 181 (Ariz. App. 1989).

A punishment should be designed to deter the individual from engaging in the criminal activities. In discussing the question of prior restraint in the context of the federal racketeering law, the court in United States v Pryba, 674 F.Supp. 1504, 1512 (E.D. Va. 1987), stated:

> The flaw in this argument is the recognized distinction between prior restraints and subsequent punishment. The evil of a prior restraint is that speech is suppressed before its status is judicially determined. Such restraints are far more likely to chill, indeed to suppress, free speech than subsequent punishment, which can be imposed only after there is the procedural safeguard of a disinterested judicial determination concerning the alleged illegality. A person is punished for speech-related conduct only after he is given the opportunity to litigate, inter alia, the constitutionality of the statute, either facially or as applied to him. In obscenity cases, he is also permitted to present the material to a jury and attempt to persuade it, under Miller, that the material

> deserves constitutional protection. Prior restraints deprive "speakers" of these important safeguards. ***.

The Pryba court went on to discuss the reasonableness of RICO as a punishment for obscenity crimes.

> This is not to say that subsequent punishment schemes such as RICO's forfeiture scheme have no chilling effect whatever. Surely it has some, indeed it is designed to accomplish just that end. But this "chilling" is a wholly legitimate consequence of the RICO forfeiture provisions or any other criminal penalty. Deterrence (or chilling) through the threat of prosecution and punishment is a legitimate goal of the criminal law. Once it is decided that obscenity does not merit First Amendment protection and indeed, once it is decided that obscenity is so pernicious that it should be criminally prosecuted, then a subsequent punishment, like RICO's forfeiture scheme, is a sensible and wholly legitimate law enforcement weapon.

674 F.Supp. at 1512-13.

The license forfeiture provision is a legitimate punishment and places considerably fewer limitations upon

speech than does the federal RICO statute. It is also less restrictive than the RICO forfeiture provision upheld by this Court in Fort Wayne Books, Inc. v Indiana, 489 U.S. ____, 109 S.Ct. 916, 103 L.Ed. 2d 34 (1989).

Instead of imposing a punishment that would severely restrict Bauer's ability to engage in speech activities, the trial court placed Bauer on probation with several conditions. Three of these conditions are significant in the instant case:

> Special Term 19 . . . "Obey the obscenity laws of the State of Arizona."
>
> Special Term 20, "You are not to be involved in any manner while you are on probation to this Court in the traffic, sale, or rental of sexually explicit items."
>
> Special Term 21, "You are to surrender all permits, licenses, grants, et cetera, in the name of Gary Bauer, Yoco Enterprises or Yoco Enterprises doing

business as the Castle Adult Bookstore."

State v Bauer, Reporter's Transcript of June 12, 1987, at 18-19.

The penalties Bauer faced were applicable to any convicted criminal and are content-neutral. This penalty is similar to that upheld by this Court in Arcara v Cloud Books, Inc., 478 U.S. 697 (1986). In Arcara the Court found that the general statutory sanctions for nuisance violations did not constitute a prior restraint when applied to a business which sold sexually oriented material. This Court concluded:

> It is true that the closure order in this case would require respondents to move their bookselling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subjected to sanction. Rather, we have subjected such restrictions to scrutiny only

> where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in O'Brien, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in Minneapolis Star.

418 U. S. at 706-07.

Under the Arizona statutory scheme like that in New York in Arcara, all violators are affected equally by the sanctions. Individuals or businesses convicted of obscenity violations are not selected for special application of this punishment provision. The Fort Wayne Court stated that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination

of material not obscene.' Smith v California, 361 U.S. 147, 154-155 (1959). Cf. also Arcara v Cloud Books, Inc., 478 U.S. 697, 706 (1986). The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents." 109 S.Ct. at 930.

The license forfeiture provision allows anyone convicted of an obscenity violation the opportunity to continue to speak. The only limitation is that he may not do so under currently-held government-granted licenses. This punishment clearly does not serve as a prior restraint.

The application of the Court of Appeals conclusions and rationale to the punishment of obscenity law violators would create a separate subclass of

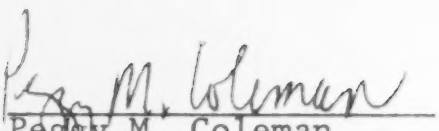
criminal offenders. This interpretation first renders meaningless the legislature's intent that obscenity violators be treated as other criminals. Secondly, it unnecessarily subjects general criminal punishments to a scrutiny that has never been required by this Court, See, Arcara v Cloud Books, Inc., 478 U.S. 697 (1986), Fort Wayne Books, Inc. v Indiana, 109 S.Ct. 916 (1989).

Consequently, the Court of Appeals' decision is an attempt to rewrite the criminal punishment statute and to thwart the will of the people of the state of Arizona.

CONCLUSION

For the foregoing reason, this court should grant the Petition for Certiorari submitted by the State of Arizona.

Respectfully submitted,



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CERTIFICATE OF SERVICE

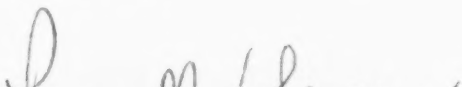
I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this eighth day of June, 1989, to the following counsel of record:

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All parties required to be served have been served.



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